

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 21

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DAVID S. GRAINGER, ANDREW GREEN,
MANSUR S. MOHAMMADI,
STEPHANE ROTH and LAURENCE G. THOMPSON

Appeal No. 2003-0402
Application No. 09/569,924

ON BRIEF

Before WARREN, JEFFREY T. SMITH and MOORE, *Administrative Patent Judges*.
JEFFREY T. SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

Applicants appeal the decision of the Primary Examiner finally rejecting claims 1 to 12.^{1,2} We have jurisdiction under 35 U.S.C. § 134.

¹ According to the Appellants, claims 13 to 16 have been withdrawn from consideration due to an election requirement. (Answer, p. 2).

² In rendering our decision, we have considered Appellants' arguments presented in the Brief, filed April 22, 2002 and the Reply Brief filed July 19, 2002. We have considered the Examiner's position presented in the Answer, mailed May 21, 2002.

CITED PRIOR ART

As evidence of unpatentability, the Examiner relies on the following reference:

Frankenbach et al. (WO '594) WO 96/37594 Nov. 28, 1996

The Examiner has rejected claims 1 to 12 as unpatentable under 35 U.S.C. § 103(a) as obvious over WO '594. (Answer, pp. 4 to 5).

BACKGROUND

Appellants' invention relates to fabric softening compositions. According to the specification, page 1, the fabric softening compositions soften the fabric without adversely affecting the absorbency of the fabric. Claim 1, which is representative of the claimed invention, appears below:

1. A fabric softening composition comprising:
 - i) at least one nonionic fabric softening agent, and
 - ii) at least one anionic surfactant, and
 - iii) 0.05 to 4.5% by weight cationic polymer,

wherein particles formed from i), ii) and iii) have a net negative charge and the composition comprises no more than 1% by weight non-polymeric cationic surfactant and/or cationic fabric softening compounds.

DISCUSSION

We have carefully reviewed the claims, specification and applied prior art, including all of the arguments advanced by both the Examiner and Appellants in support of their

respective positions. This review leads us to conclude that the Examiner's § 103 rejection is not well founded.

Rather than reiterate the respective positions advanced by the Examiner and Appellants, we refer to the Examiner's Answer and to Appellants' Briefs for a complete exposition thereof.

The Examiner asserts that the claimed invention is unpatentable over WO '594. According to the Examiner, WO '594 "discloses personal cleansing products comprising about 1-30% of a dispersed oil phase comprising an oil component, about 5-30% of a surfactant, which may be anionic, and water." (Answer, p. 4). The Examiner also states:

The dispersed particles are not taught to have a net anionic charge, but the examiner takes the position that when the anionic surfactant is present in excess over the cationic material, more anionic charge than cationic charge will be present. This reference differs from the claimed subject matter in that it does not disclose a composition which meets appellant's claims with sufficient specificity to constitute anticipation....

It would have been obvious at the time of the invention was made to make such a composition, because this reference teaches that all of the ingredients recited by appellants are suitable for inclusion in a surfactant composition. The person of ordinary skill in the surfactant art would expect the recited compositions to have properties similar to those compositions which are exemplified, absent a showing to the contrary.
(Answer, p. 4).

We agree with Appellants that the claimed invention is distinguishable over the invention of WO '594. (Brief, pp. 7-9). The subject matter of claim 1 is directed to a fabric

softening composition wherein particles formed from the at least one nonionic fabric softening agent, the at least one anionic surfactant, and the cationic polymer have a net negative charge and the composition comprises no more than 1% by weight non-polymeric cationic surfactant and/or cationic fabric softening compounds. The Examiner has argued that it would have been obvious to make the claimed composition, because WO '594 teaches that all of the ingredients recited by appellants are suitable for inclusion in a surfactant composition. While WO '594 may disclose the components are suitable for surfactant compositions, there is no disclosure of the charge of the composition. There is no indication that a composition with a net negative charge would have been suitable for the intended purpose of the WO '594 reference as a personal cleansing composition that demonstrate excellent skin feel characteristics, good cleansing ability and conditioning performance. (WO '594, p. 4). The Examiner has not provided a reason to provide the composition of WO '594 with a net negative charge. The mere fact that the prior art could be modified as proposed by the Examiner is not sufficient to establish a *prima facie* case of obviousness. *See In re Fritch*, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1783 (Fed. Cir. 1992). The Examiner must explain why the prior art would have suggested to one of ordinary skill in the art the desirability of the modification. *See Fritch*, 972 F.2d at 1266, 23 USPQ2d at 1783-84. The Examiner has not provided such an explanation.

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CONCLUSION

For the above reasons, and those presented in the Briefs, we conclude that the Examiner has not carried the burden of establishing a *prima facie* case of obviousness of the invention recited in any of the Appellants' claims. Consequently, we reverse the Examiner's 35 U.S.C. § 103 rejection.

REVERSED

CHARLES F. WARREN
Administrative Patent Judge

JEFFREY T. SMITH
Administrative Patent Judge

JAMES T. MOORE
Administrative Patent Judge

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